No. 14,703

IN THE

United States Court of Appeals

For the Ninth Circuit

UNITED STATES OF AMERICA for the Benefit and on Behalf of Harry Sherman, Chas. Robinson, Ronald D. Wright, Stuart Scofield, Lee Lalor, William Ames, Ernest Clements, Carl Lawrence, Gordon Pollock and Harold Sjoberg, as Trustees of the Laborers Health and Welfare Trust Fund for Northern California,

Appellants,

vs.

DONALD G. CARTER, Individually; DONALD G. CARTER, Doing Business as Carter Construction Company, CARTER CONSTRUCTION COMPANY and HARTFORD ACCIDENT AND INDEMNITY CO.,

Appellees.

REPLY BRIEF FOR APPELLANTS.

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Table of Authorities Cited

Cases

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In its brief the appellee surety draws a distinction between "wages" and "employee benefits relating to the conditions of employment," and argues that its liability under its bond is limited to the former. Appellee points to no provision of the Miller Act or of its bond, however, which would justify any such limitation.

The obligation imposed by the Miller Act upon the surety is to pay *in full* for labor supplied to a bonded

project. Therefore, if health and welfare contributions are a part of the consideration agreed to be paid for labor they are within the obligation of the bond, regardless of whether they are called "wages" or "employee benefits relating to the conditions of employment."

Appellee has not advanced a single sound argument in answer to our clearly stated proposition that health and welfare contributions *are* a part of the compensation agreed to be paid for labor. Instead, it has cited *Brogan v. National Surety Co.* (1918) 246 U.S. 257 as its principal authority, a case which has no relevancy to the issue. In the *Brogan* case a groceryman was endeavoring to establish his status as a *supplier* and hence it was necessary for him to show that the groceries and provisions for which he claimed were furnished in the prosecution of the work. In this case, on the other hand, appellants are claiming as trustees for laborers who concededly furnished labor on the projects involved. The issue is not whether appellants have furnished insurance or other benefits which have been consumed in the prosecution of the work, but rather whether the payments which the contractor agreed to make to appellants were a part of the consideration for the labor which was admittedly performed on the projects.

It is not necessary that appellants show that they personally furnished labor to the projects—which obviously they cannot do. It is sufficient that they show that the men for whom they are trustees furnished the labor and that the payments which the

contractor agreed to make to them were a part of the agreed consideration for such labor.

Further, it is not necessary that appellants show that either the United States or the appellee surety was a party to the collective bargaining agreement which provided for the health and welfare payments. It is sufficient that the *contractor* was a party to such agreement, since it is the obligation of the contractor that is guaranteed by the appellee.

Appellee is in error when it asserts that the health and welfare payments "were not essential to the construction of the Government's buildings at Travis Air Force Base and Mather Field" (Br., p. 6). The obligation of the contractor to make these payments was imposed by the same collective bargaining agreement which fixed the amount of the hourly wages that he was required to pay to the laborers. A failure to make these payments was as much a breach of this agreement as a failure to pay the hourly wages would have been, and would have justified the same type of remedial action as a failure to pay wages; namely, the withholding of the services of the laborers who were entitled to the benefit of the payments.

The circumstance above mentioned serves to distinguish this case from the case of *City of Portland ex rel. National Hospital Association v. Heller* (1932), 139 Ore. 179, 9 Pac. (2d) 115, cited by appellee at page 6 of its brief. In the *City of Portland* case the court emphasized the fact that the plaintiff hospital association had no contractual relationship with the employees of the contractor, and expressly found that

the association could not be considered "in the position of assignee of the employees" (9 Pac. (2d) 116). In the case now before this court, on the other hand, appellants are trustees for the contractor's employees, the health and welfare plan which they administer was negotiated by the collective bargaining representative of such employees as a part of the consideration for the services furnished by the employees and appellant stands in the shoes of the employees as completely and effectively as an assignee (Opening Brief, pp. 16-17).

The *City of Portland* case has never been cited, except in *Sherman v. Achterman & Olesen,* Opening Brief, App., pp. vii-viii, where it was distinguished on three grounds, and in view of the recent decision of the Oregon Supreme Court in *Coos Bay Lumber Company v. Local 7-116, International Woodworkers of America* (CIO), 279 Pac. (2d) 508, *re'g den.,* 280 Pac. (2d) 412, cited in our opening brief at page 12, we question whether it would now be followed by the Oregon Court. In any event, however, the case is not pertinent here and furnishes no authority for a decision in favor of appellee.

The case of *United States v. Landis & Young* (W.D. La. 1935), 16 F. Supp. 832, and similar cases holding that Workmen's Compensation insurance premiums are not recoverable under a Miller Act bond, are also clearly distinguishable from the present case. The premiums paid by a contractor for employer liability or Workmen's Compensation insurance cannot be considered as a part of the consideration for the

services performed by the employees. Under California law, an employer is expressly prohibited from making or taking any deduction from the earnings of any employee either directly or indirectly to cover the whole or any part of the cost of Workmen's Compensation (California Labor Code, Section 3751). The insurance carrier has no relationship whatever to the employees covered by the insurance which it provides, and it has no basis for a claim that it stands in the same position as an assignee of such employees.*

The fact that the Miller Act requires that a Federal public works contractor supply a performance bond as well as a payment bond is no answer to our contention that the payment bond should be construed to cover health and welfare contributions in order to protect the Government against delays in performance of the work. If the laborers were to walk off a Government project because the contractor had failed to make the agreed health and welfare contributions, the fact that the contractor had posted a performance bond would not put the men back to work. The Government might ultimately recover damages for the delay caused by the work stoppage

*It should be noted, however, that the authorities are not unanimous in holding that Workmen's Compensation premiums are not recoverable under a Heard or Miller Act bond. In *United States for the use of Watsabaugh & Co. v. Seaboard Surety Co.* (D. Mont. 1938), 26 F. Supp. 681, which is cited by appellee as authority for its own position (Brief, pp. 6, 10, 11), the court held that such premiums were recoverable under a Heard Act bond because the thing supplied, namely, Workmen's Compensation insurance, "was essential to carrying on and completing the work provided for in the contract and was wholly consumed in the work" (26 F. Supp. 692).

from the surety on the performance bond, but a money recovery would be an inadequate remedy for the inconvenience and loss to the Government and public due to the delay.

Finally, with regard to appellants' claim for liquidated damages and attorneys' fees, appellee appears to contend that it cannot be held liable under its bond unless we establish that it was a party to the trust agreement which provides for these payments. This contention, we submit, is without merit. The *contractor* was a party to the trust agreement and to the collective bargaining agreements which provided for and maintained the trust agreement in effect, and it is the obligation of the contractor which the appellee has guaranteed. Appellee was not a party to any of the agreements whereby the contractor paid hourly wages to its employees, yet appellee concedes that it was obligated under its bond for the payment of these wages. The claims for health and welfare contributions, liquidated damages and attorneys' fees stand on the same footing as the claims for hourly wages; that is, they are all claims for the consideration which the contractor agreed to pay for labor which was performed on his projects.

The case of *United States to the use of Watsabaugh & Co. v. Seaboard Surety Co., supra,* which appellee cites in support of its contention that attorneys' fees are not recoverable, is not in point. In that case there was no agreement by the contractor to pay the claimant a reasonable attorneys' fee in the event of a default, whereas in this case such an agree-

ment is included in the trust agreement to which the contractor was a party.

Appellee has chosen to ignore most of the arguments which we presented in our opening brief in support of our contention that health and welfare contributions are a part of the compensation agreed to be paid for the labor supplied to the projects covered by appellee's bond. In concluding its argument, it asserts that the contributions "were not compensation for labor in the economic sense of a 'price' for labor determined by the forces of supply and demand in a free market" (Brief, p. 13), but it cites no authority or sound reason in support of this assertion. The explanation for this significant and important omission, we submit, is that no such authority or reason exists.

As the court asked in the *Achterman* case (Opening Brief, App., p. iii), "what else are these but payments for the performance of work? Why, except to purchase labor, did the employer agree to make the payments?"

The answer to these questions is clear. The contractor on appellee's projects, like every other contractor in Northern California engaged in major construction projects, had to agree to make health and welfare contributions in order to obtain laborers to man his projects. The agreements which provided for these contributions were negotiated by the recognized and acknowledged collective bargaining representatives for these laborers and the *only* thing that these representatives had to sell was the services of

the men they represented. The amended complaint in this proceeding alleged that the contractor agreed to make the contributions and related payments "in consideration of labor and services performed and to be performed" for the contractor (Tr. 7-8) and appellee stipulated that such was the fact for the the purposes of the motion and counter-motion for summary judgment (Tr. 13).

The arguments advanced in appellee's brief clearly concede that if the health and welfare contributions and related payments are held to be part of the agreed compensation for labor, they are within the coverage of appellee's bond. For the reasons given in our opening brief and in this brief, we respectfully submit that this Court should hold that the payments *are* compensation for labor and that the judgment of the District Court should be reversed.

Dated, San Francisco, California,
August 31, 1955.

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